IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5736 OF 2003

Vishnu Yashwant Gurav .... Petitioner

Versus

1. Pandurang Shripati Gurav. & ors... Respondent

Mr.S.S.Patwardhan for Petitioner

CORAM : A.S.Oka, J

DATE: 10th December, 2004

P.C.:

1. By an order dated 8th September, 2003 notice for final disposal was ordered to be issued. Office noting shows that the respondent no.1 is duly served and affidavit of service is filed. On the prayer made by the advocate for the petitioner by order dated 1st October, 2003 names of respondent nos.2 to 4 have been ordered to be deleted at the risk of the petitioner.

2. The respondent no.1 is the original plaintif who filed a suit for possession against the petitioner and three others. The suit was decreed by the trial court. An appeal preferred by the petitioner against the said decree was admitted and was pending in the District Court. On 31st December, 1997 the appeal was dismissed for default and on 13th January, 2003 an application for restoration of the appeal was made by the petitioner. Alongwith the said application an application for condonation of delay was filed. By the impugned judgment and order, the application for condonation of delay has been dismissed.

3. Learned counsel appearing for the petitioner submitted that the appeal was filed by the petitioner within limitation and it remained pending for seven years. He submitted that the proceedings of the appeal were being looked after by the brother of the petitioner. After demise of his brother the petitioner could not look after the appeal. On 31st December,

1997 the petitioner was out of village as he had gone to district Ratnagiri for earning his bread and butter. He received a notice of the trial court of the execution proceedings in August, 2001. Thereafter there were talks of compromise between the petitioner and the respondent no.1 and after the talks failed an application was made for grant of certified copy and thereafter restoration application was made.

4. He submitted that while considering the application for condoning the delay, the court below ought to have adopted a liberal approach. He pointed out that the evidence was recorded and two witnesses examined by him have deposed that talks of compromise were in progress. He submitted that it is not as if that the petitioner did not adopt remedy and in fact had preferred one appeal promptly within limitation.

5. None appears for the respondent no.1 though served. This is a case where the petitioner filed an appeal against the decree for possession passed by the trial court. His case is that the real brother who was impleaded as respondent no.1 was in fact looking after the proceedings on his behalf. The appeal of the year 1990 remained pending till the year 1997. It is true that the notice of execution proceedings was served on the petitioner in August, 2001. The case of the petitioner is that there were talks of compromise. In support of the said case, evidence was led and even in the impugned judgment and order the court below has noted that the petitioner himself and his two witnesses have given evidence that the compromise talks were going on. Mr. Patwardhan invited my attention to the suggestion given to the petitioner in his cross examination. The suggestion given is that except for one or two years, the petitioner did not try for compromise.

6. In this view of the matter, the appellate court ought to have taken a liberal approach in the matter. It is true that prejudice will be caused to the respondent no.1 if the delay is condoned. The respondent no.1 can be compensated by ordering payment of costs.

7. In my view, delay in filing an application for restoration deserves to be condoned. It is made clear that as a result of deletion of the respondent nos.2 to 4 from the array of respondents in this writ petition, one application for restoration made by the petitioner in

the district Court will be heard and decided only as against the respondent no.1. It appears from the impugned order that the learned Additional District Judge has considered only the prayer for condonation of delay. As in my view, delay deserves to be condoned. Application for restoration will have to be heard by the appellate court on merits.

8. Hence, I pass the following order :

(i) The impugned order is set aside. Delay in filing the application for restoration of Civil Appeal No.112 of 1990 stands condoned.

(ii) The appellate court will now consider one prayer for restoration of the Appeal. It is made clear that the application for restoration will now survive only as against the respondent no.1. The effect of deletion of respondent no.2 to 4 will be considered by the appellate court.

(iii) Rule is made absolute in the above terms.

(iv) Considering the facts of the case, the petitioner will have to pay costs of Rs.2500/- to the respondent no.1. The amount of costs shall be deposited by the petitioner in the appellate court within a period of six weeks from today. If the amount is not deposited within the stipulated time, the impugned order will stand.

(v) Parties to act on an authenticated copy of this order.

A.S.OKA, J